PHILLIP SECURITIES PTE.

v.

WONG AH HENG

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CIVIL SUIT NO. 543 OF 1985]
28 OCTOBER 1986

CIVIL PROCEDURE: *Application to set aside judgment in default of defence - Notice of intention to enter default judgment not given - Application for further arguments in Open Court - Decisive factors in setting aside default judgments.*

This was an application by the defendant to set aside a judgment in default of defence. The writ of summons was validly served and appearance duly entered by the defendant's then solicitors on 22 January 1986. The plaintiffs' solicitors entered judgment in default of defence on 4 March 1986. The defendant alleged that his solicitors had requested for further particulars (which were not supplied) and that the 48 hours' notice of intention to enter default judgment was not given.

Held:

[1] The defendant's application for further arguments in open Court was rejected.

[2] An explanation for the failure to file a statement of defence in due time is a relevant factor but not a decisive factor in deciding whether or not to set aside a default judgment. (*Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd.* followed).

[3] Here the absence of the 48 hours' notice and the plaintiff's failure to supply further particulars are not decisive factors.

[4] The decisive factor in all cases of setting aside of default judgments is whether there is evidence before the Court disclosing a *prima facie* defence. In this case there was no such evidence.

[Application dismissed with costs.]

Case referred to:
Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd. [1985] CLJ (Rep) 760

Legislation referred to:
Evidence Act 1950, s. 114

For the plaintiffs - Wong Fei Hong; M/s. Stephen L.S. Sya, Ho, Sia & Associates
For the defendant - Yusuf Khan bin Ghows Khan; M/s. Yusuf Lee Pathma & Marbeck

JUDGMENT

Mahadev Shankar J:

On 20 October 1986, after hearing the arguments for and against an application by the defendant to set aside a judgment in default of defence, I dismissed it with costs.

Presumably preparatory to appeal, the defendant has applied for further argument in Open Court which I have now certified that I do not require.

The reasons for my dismissal of the application now follow.

The plaintiffs are a share-broking firm in Singapore. In June 1985 they filed a writ against the defendant in which it was averred:

> The defendant is justly and truly indebted to the plaintiffs in the sum of S$282,622.38 being the balance of the principal and interest on account due to the plaintiffs full particulars whereof are provided.

The statement of claim further averred that notwithstanding numerous demands, the sum owed was not paid and judgment was claimed accordingly.

The address of the defendant given in the writ was at the K.L. Mandarin. hotel, Jalan Sultan, Kuala Lumpur.

A professional firm of process servers were engaged to effect service. Their representative called at the defendant's address at the Mandarin Hotel on 2 and 24 August 1985 to effect service. But the receptionist stated that the defendant was not in. So on 27 August 1985, the process server wrote an AR registered letter of appointment addressed to the defendant enclosing a copy of the writ of summons for his attention and stated that he would be calling upon the defendant on 15 September 1985 between 9.30 and 10.00 a.m. to serve the writ. The AR registered letter was not returned. The process server kept the appointment but the defendant did not turn up.

So an order of substituted service was obtained, and on 11 January 1986 the writ was advertised in the New Straits Times.

This produced immediate results. On 22 January 1986, the defendant entered appearance by his solicitors M/s. Henry Lim & Co. who practised law in Ipoh.

It seems to me most desirable that as soon as possible the rules committee should provide that in all future cases, the residential address of the defendant should be stated in the appearance and not just an address for service. It will be noted that the standard form of the writ requires the plaintiff to disclose his residential address.

The next step in the action was a judgment in default of defence which the plaintiff's solicitors applied for and obtained on 4 March 1986 for the full sum claimed.

On 16 July 1986, the defendant appointed a Kuala Lumpur firm of solicitors to take the place of M/s. Henry Lim & Co.

On 27 August 1986, the new solicitors filed a summons-in-chambers making the present application. In it the grounds of the application were stated firstly that the judgment in default had been improperly obtained, and secondly that the plaintiffs had filed their action in the wrong jurisdiction. In support of the application, Mr. Marbeck, one of the lawyers in the defendant's office, affirmed an affidavit.

On many previous occasions in this Court I have cautioned solicitors filing affidavits on behalf of their clients in contested matters because it is the view of this Court that this practice is undesirable. The proper deponents in contested matters are the parties themselves, and their witnesses.

In the present case, the dfendant did not affirm any affidavit. Consequently there is no material whatsoever from him before the Court disclosing what, if any, defence he has going to the merits of the plaintiffs' claim.

In his affidavit, Mr, Marbeck's complaint is that after appearance was entered, the defendant's solicitors applied for particulars of the plaintiffs' claim, and that these particulars were not supplied. He further alleged that the plaintiffs' solicitors were in breach of the rules of practice and etiquette in failing to give the defendant's solicitors 48 hours' notice of their intention to obtain judgment in default. It was further alleged that by failing to furnish the particulars, the course of action of the plaintiffs remained uncertain and no nexus had been established between the plaintiffs and the defendant.

It was upon this material that this Court was urged that the defendant had a good defence.

The plaintiffs filed an affidavit in reply. Attached to it was credible material going to prove that in February 1984 the defendant had bought a substantial quantity of shares in the Supreme Corporation - a name not by any means unknown in Malaysia. All the contract notes were duly posted to the defendant in Ipoh. In September and October 1984, the defendant instructed the plaintiffs to sell off some of his shares. This was done, and the defendants's account was credited with the proceeds. The payment vouchers and contra-statements were again duly posted to the defendant's address in Ipoh.

Since the defendant did not pay for 120,000 shares in Supreme Corporation bought for him on 10 February 1984, the plaintiffs did not release these shares. After many reminders for payment, the plaintiffs cut their losses by selling off some of the shares and crediting the defendant accordingly.

The contractual arrangement between the parties was that interest would be chargeable on outstanding sums after advise notes had been sent for collection.

As at March 1985, the total amount claimed was S$282,622.38. On 3 May 1985, the plaintiffs posted by registered post both to the defendant's address in Kuala Lumpur and his address in Ipoh a statement of account and asked for settlement within 7 days. No settlement materialised.

So these proceedings were initiated.

Section 114 of the Evidence Act - illustration (f) raises a presumption that the common course of business has been followed in particular cases. In the absence of positive evidence to show that the usual course of post was interrupted by disturbances, the presumption therefore is that a letter shown to have been posted was duly received. (see Explanation (vii) to illustration (f)).

On the materials before me, therefore, I find as a fact that the defendant must have received all the letters sent by the plaintiffs, and their process server, to the defendant and that in the absence of any evidence to the contrary, I must also infer that the defendant wilfully evaded making any positive response to the plaintiffs' claims for payment and also wilfully evaded service.

The fact that the defendant responded immediately to the advertisement in the national newspaper by instructing a firm of solicitors in Ipoh is some evidence from which it can be inferred that he had maintained his address in Ipoh. Furthermore, the principal amount due for one transaction in 28,000 Hong Leong Industry shares and 15 transactions in Supreme Corporation shares ran up to nearly RM642,000.

Following *Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd.* [1985] CLJ (Rep) 760, I would also observe that whilst the explanation for the failure to file a defence in due time is relevant in deciding whether or not to set aside a default judgment, it need not be a decisive consideration.

In this case there was a clear omission to observe the rules of etiquette as between the solicitors involved. No notice of intention to obtain judgment in default was given. Indeed the defendant's solicitors may have been labouring under the impression that having applied by letter for further and better particulars of the statement of claim, they need not do anything further until the particulars were actually received. But before the judgment was obtained, the plaintiff's solicitors had written to the defendant's solicitors to say that all the information requested was in the possession of the defendant to whom reference should be made. This brush-off may be understandable considering the total lack of courtesy (putting it at its lowest) which the defendant himself had shown the plaintiffs. But the etiquette in question which requires the 48 hours', notice to be given is a matter between the solicitors. It is not a duty owed by the plaintiffs' solicitors to the defendant personally. The sanction for a mere breach of etiquette between solicitors is more properly a matter for the professional body.

I do not think that merely because the 48 hours' notice was not given, the defendant is entitled to have the judgment set aside as a matter of right.

The crucial factor in applications of this sort is whether there was evidence before the Court disclosing a *prima facie* defence. On that point there was no evidence at all.

I do not think it can be said that no cause of action whatsoever was disclosed by the statement of claim. As for the failure to provide particulars, it was open to the defendant to make a formal application to the Court coupled with a further application for a stay of proceedings until the particulars were supplied.

The only other point taken was that the action had been filed in the wrong jurisdiction. But the jurisdiction of the High Court runs throughout Malaysia and Singapore litigants have found the Johore Bahru Courts a convenient venue. If there was a good defence, and an application had been made at the appropriate time for this action to be transferred either to KL or Ipoh, such an order may readily have been made but the time for that has now passed.

In the circumstances, albeit I feel some degree of sympathy for the defendant's solicitors, (but none for the defendant personally), I thought that the proper order was to dismiss the application.

As to the application for further argument, there is absolutely no material before me to disclose any arguable or triable issues here. The absence of evidence disclosing a *prima facie* defence is total. So I refused to hear any further argument. The defendant will therefore have to pay the costs of this application as ordered.

Also found at [1987] 1 CLJ 485